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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIVIL ACTION No. 5009

AUTO TRANSPORTS, INC., AND GENERAL MOTORS CORPORATION,

Appellants,

vs.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,

Appellees

STATEMENT OF BASIS ON WHICH APPELLANTS CONTEND THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW ON APPEAL THE JUDGMENT OR DECREE APPEALED FROM, AS REQUIRED BY SUPREME COURT RULE 12

Pursuant to Supreme Court Rule 12, Paragraph 1, above appellants file this their statement showing the basis on which said appellants contend that the Supreme Court has appellate jurisdiction to review on appeal the judgment and decree appealed from herein, as follows:

I

The provisions of the statute believed to sustain appellate jurisdiction are as follows:

By Section 1253 of Title 28 of the United States Code, it is provided:

"Sec. 1253. *Direct appeals from decisions of three-judge courts.* Except as otherwise provided by law,

any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

By Section 1336 of Title 28 of the United States Code, it is provided:

"Sec. 1336. *Interstate Commerce Commission's orders.* Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

By Section 2321 of Title 28 of the United States Code, it is provided:

"Sec. 2321. *Procedure generally; process.* The procedure in the district courts in actions to enforce, suspend, enjoin, annul, or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter." (Chapter 157, Title 28 U. S. Code).

And by Section 2325 of Title 28 of the United States Code, it is provided:

"Sec. 2325. *Injunction; three-judge court required.* An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

II

The judgment and decree appealed from was entered on the 23rd day of November, 1951, and the application for appeal is presented on the 28 day of December, 1951.

III

This action was brought to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission (hereinafter called Commission), issued on May 17, 1950, in a case before that Commission entitled Auto Transports, Inc., Suspension of Permit, Commission Docket No. MC-C-1107, suspending the right of appellant, Auto Transports, Inc., to operate as a contract motor carrier under a permit issued to it in Commission Docket No. MC-106553.

The order was issued pursuant to Section 212(a) of the Interstate Commerce Act (49 U.S.C. 312(a)) for an alleged failure to comply with the provisions of Section 218(a) of the Interstate Commerce Act (49 U.S.C. 318(a)) and the requirements of Commission Tariff Circular MF-2 and supplements thereto, issued by the Commission, all with respect to the publication, keeping open for public inspection, and filing with the Commission of the minimum rates and charges actually maintained and charged for the transportation of property in interstate commerce.

All administrative remedies provided by Part II of the Interstate Commerce Act, (49 U.S.C., Sec. 301, et seq.) of which the above referred to sections are a part, had been exhausted before this action was instituted.

By Section 205(g) of the Interstate Commerce Act (49 U.S.C. 305(g)), it is provided:

> "Any final order made under this chapter shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of

the Commission made under Chapter 1 of this title: *Provided,* That where the Commission, in respect of any matter arising under this Chapter, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under Section 2284 of Title 28, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction."

By Section 205 (h) of the Interstate Commerce Act (49 U.S.C., sec. 305(h)), it is provided:

"All the provisions of section 17 of this title shall apply to all proceedings under this Chaper."

And by Section 17(9) of the act (49 U.S.C., sec. 17(9)), it is provided:

"When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a Division, an individual Commissioner, or a Board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."

Pursuant, therefore, to the foregoing Sections of Title 49, and to Sections 1336, 2281-2284, and 2321-2325 of Title 28, United States Code, this action was brought to set aside and enjoin the enforcement of an order of the Commission after all administrative remedies had been exhausted. The matter was heard by a three-judge District Court.

The majority opinion of the three-judge District Court approved the order of the Commission issued on May 17, 1950, and denied appellant's application to set it aside and enjoin its enforcement.

IV

Cases relied upon and believed to sustain jurisdiction are as follows:

Interstate Commerce Commission vs. Hoboken Manufacturers R. Company, 1943, 64 S. Ct. 159, 320 U. S. 368, 88 L. Ed. 107, Rehearing denied 64 S. Ct. 516, 321 U. S. 801, 88 L. Ed. 1088.

U. S. vs. Hancock Truck Lines, 1945, 65 S. Ct. 1003, 324 U. S. 774, 89 L. Ed. 1357.

V

Pursuant to an application filed by appellant, Auto Transports, Inc., with the Commission in July, 1947, the Commission issued an order in Docket No. MC-106553, authorizing the issuance of a contract carrier's permit to said appellant upon compliance with the terms of the order.

One of the terms of that order was that appellant, Auto Transports, Inc., comply with the provisions of Section 318, Title 49, U. S. Code, which provides that every contract carrier by motor vehicle shall file with the Commission, publish and keep open for public inspection in the form and manner prescribed by the Commission, schedules containing the minimum rates and charges of such carrier actually maintained and charged for the transportation of passengers or property in interstate or foreign commerce.

Complying with the terms of said order appellant, Auto Transports, Inc., filed and published a schedule of minimum rates and charges as required by Section 318, Title 49, and filed with the Commission a true copy of its contract which it had entered into with appellant, General Motors

Corporation, *its only shipper* (hereinafter called General Motors), as required by the provisions of Section 320, Title 49.

On August 27, 1947, the permit here involved was issued, and continuously since such date appellant, Auto Transports, Inc., has been operating thereunder; and it has invested substantial sums in facilities and equipment, and has as well built up and maintained an organization of approximately 300 persons which would permit it to adequately and satisfactorily fulfill the terms of its contract with General Motors.

The minimum rates and charges set forth in the schedule filed and published by the appellant, Auto Transports, Inc., prior to issuance of the permit on August 27, 1947, have not been changed since such schedule was filed and published. The minimum rates and charges reflected by the schedule when filed were the same transportation charges reflected by the contract then in existence between appellant, Auto Transports, Inc., and General Motors, and such were the transportation charges collected until the contract was subsequently revised increasing the rates and charges.

In accordance with the provisions of Section 320, Title 49, U. S. Code, and Rules and Regulations promulgated by the Commission, appellant, Auto Transports, Inc., from time to time since the issuance of its permit, has revised, amended and modified its contract with General Motors so as to increase the rates and charges for authorized transportation service.

Such amendments to or revisions of the contract as originally filed had always been presented to and accepted by the Commission without question until a further amendment and revision was presented to the Commission in November, 1948.

At that time the Commission took the position that

where a contract carrier was contracting with only one shipper the minimum rates and charges reflected by its published schedule should be at all times identically the same as the rates and charges reflected by its contract and all revisions thereof, as and when made.

Section 320, under which said contract and all revisions or modifications thereof were filed, provides that the Commission shall not make the same public, except under certain conditions not here involved.

The Commission, in its order of May 17, 1950, suspended the right of appellant, Auto Transports, Inc., to engage in the transportation authorized in its permit because said appellant refused to revise its schedule of minimum rates and charges upward so that the rates and charges published therein would be the same as those provided for in its contract and the revisions and modifications thereof.

Therefore, the question here involved is whether or not the Commission can require a contract carrier to file and publish a schedule of minimum rates and charges containing the rates and charges the same as those provided for in its contract each time the contract rates and charges are changed by agreement between the carrier and its shipper, even though such contract rates and charges at all times are in excess of the rates and charges reflected in its published schedule of minimum rates and charges.

The order of the Commission and the decision of the majority of the court below are apparently *contra* to the thinking of this court as reflected by denial of petition for certiorari in *Gustave Betterman* v. *American Stores Company*, 80 A. (2d) 66 (Pa. Sup.) Certiorari denied, Case No. 190, Oct. 8, 1951, 96 L. Ed. 32.

One reason this question is substantial, is that if the Commission can, as it claims authority so to do under section 318(a), require a contract carrier with a contract with

only one shipper, as is the case here, to file and publish a schedule of minimum rates and charges containing rates and charges which are the same as those contained in its contract, and to amend said schedule each time the contract rates and charges are changed, the result would be that the said contract rates and charges would be made public contrary to the provisions of Sec. 320, Title 49, which prohibits the Commission from making public any contract between a contract carrier and a shipper. Obviously, such was not the Congressional intent.

This question is substantial for the further reason that the operations, contracts, schedules and permits of all contract carriers are involved.

Furthermore, the regulations of the Commission relating to filing schedules of minimum rates and charges, (Rules 49 C. F. R. 187.8(b)), provide that no change may be made in published schedules of minimum rates and charges of contract carriers except on 30 days notice. They also require that in the filing of such schedules copies of the contracts involved in the particular operation must be filed at the same time. As to the filing of subsequent contracts, or amendments or revisions of a prior existing contract, however, the regulations permit the filing of such contracts, or amendments or revisions within 20 days after they become effective.

The requirement as made by the Commission in this case would therefore destroy the flexibility and freedom of contract. This is one of the inherent advantages of contract carriage, inasmuch as no waiting time is required for the parties to enter into new contracts, or amendments or revisions of an existing contract as circumstances may immediately warrant, provided the resulting rates and charges are not lower than the rates and charges shown in the car-

rier's published schedule of minimum rates and charges on file with the Commission.

Also in the event a shipper and a carrier should agree that the costs of the carrier have increased or decreased to the extent that an adjustment in the rates and charges is justified or necessary, such adjustment could not be put into effect, under the Commission's order here, except by filing a revised schedule of minimum rates and charges effective not sooner than the expiration of a period of 30 days after filing. Under the power of the Commission to suspend a schedule it might not become effective for a period of seven months (Sec. 318).

This question is substantial for the further reason that with the Commission having the power to suspend or reject a minimum schedule, as it does a tariff of common carriers, such a requirement would destroy the distinct different standards of rate regulation applicable to contract carriers by motor vehicle on the one hand and common carriers by motor vehicle on the other, contrary to and in derogation of the national transportation policy as enunciated by the Congress. This is best illustrated by the statutory requirement that common carriers by motor vehicle must file tariffs, on 30 days notice, containing the exact rates to be charged, with the further requirement that no "greater or less or different compensation" shall be charged than that provided for in such tariffs (Sec. 317). On the other hand, contract carriers by motor vehicle are merely required to file a schedule of "minimum" rates and charges, on 30 days notice only with respect to reductions in such schedules, with the added requirement that the contract carrier shall not charge or collect "less compensation" than that provided for in its schedule of minimum rates.

Also, such a requirement would result in discriminatory subclassifications of contract carriers. Examples of this

would be: (1) The case of a contract carrier with two or more shippers, and therefore with two or more contracts. Such a contract carrier would be required to publish and file with the Commission a schedule of minimum rates and charges corresponding to the rates and charges reflected in only one of its contracts. Thereafter such a contract carrier would be free to contract with any or all of its shippers at any time for rates and charges equal to or in excess of the rates and charges in its published schedule of minimum rates and charges and to make such changes in its rates and charges immediately effective. All that such carrier would be required to do would be to file with the Commission copies of such contracts within 20 days after their effective date, and the Commission would be prohibited from making the same public (Sec. 320; 49 C.F.R., Sec. 173.1). In this example the subclassification of the contract carrier probably would be a multiple shipper contract carrier. (2) The case of a contract carrier with only one shipper. Such a carrier, having only one shipper and therefore only one contract, would be required to seek approval and permission of the Commission to publish schedules of minimum rates and charges each time its rates and charges were changed by modification or change in its contract with its shipper, thus denying to such a carrier the flexibility and freedom of contract enjoyed by a carrier and shipper of the first class mentioned. In this latter example the subclassification of the contract carrier probably would be a one-shipper contract carrier. In the first example the subclassification would give the carrier and the shipper a distinct and substantial advantage, while in the second example the carrier and the shipper would be placed at a distinct and substantial disadvantage. No provision is contained in the Interstate Commerce Act requiring or permitting any such sub-

classifications of contract carriers, or subclassifications of any nature of contract carriers.

Appellants respectfully submit that the Commission erroneously determined that a contract carrier is required to file and publish a schedule of minimum rates and charges containing the same rates and charges as those provided for in its contract, even though such contract rates and charges exceed the rates and charges reflected in its published schedule of minimums, and that the District Court erred in affirming the action of the Commission.

VI

Appellants attach hereto copies of the majority and dissenting opinions handed down by the three-judge court on November 2, 1951, which was followed by the making of findings of fact, conclusions of law and the entry of final judgment and decree on November 23, 1951.

Dated this 28 day of December, 1951.

Respectfully submitted,

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APPENDIX "A"

Before Murrah, Circuit Judge, and Vaught and Wallace, District Judges

MURRAH, *Circuit Judge:*

OPINION

Pursuant to a show cause order dated November 1, 1949, the Interstate Commerce Commission, on May 17, 1950, entered its order suspending Auto Transport's right to operate as a contract motor carrier under its permit issued in MC-106553. After denial of a petition to vacate and reconsider the suspension order, which finally became effective December 15, 1950, Auto Transport brought this action against the United States and the Interstate Commerce Commission pursuant to Section 17(9), Title 49 USC, to set aside and enjoin the enforcement of the order. The General Motors Corporation, Auto Transport's only shipper, intervened in support of the complaint.

This three judge court, as constituted under Section 2284, Title 28, USC, is vested with jurisdiction of the action under Section 1336, Title 28 USC, 62 Stat. 931, and Sections 2321-2325, Title 28 USC.

A temporary restraining order was issued on December 12, 1950, before the final effective date of the suspension order, and by agreement of the parties, has been continued in effect pending disposition of the cause on its merits.

On July 12, 1946, Auto Transport was granted temporary authority to transport new automobiles over irregular routes from points in Wyandotte County, Kansas to designated points in fifteen states. On August 27, 1947, the Commission issued Auto Transport a permit to perform the same service. Concurrently with the issuance of the temporary authority in 1946, Auto entered into a contract with the intervenor, General Motors, providing for the transportation of its new automobiles, automobile cabs and bodies from its plant in Wyandotte County, Kansas, to the designated points in the temporary authority and subsequent permit. The contract, filed with the Commission in accordance with Section 320(a), Title 49 USC, provided for the

rates and charges for the transportation of the automobiles to the designated points. Auto has never had any other contract with any other shipper for the transportation of property under its temporary authority or permit.

Before the commencement of the operation, Auto also filed with the Commission a schedule of minimum rates and charges in accordance with Section 39(a), Title 49 USC. This schedule of minimum rates and charges was the same as those provided in the contract. The schedule of rates has never been revised or amended, but the contract rate has been amended to revise the rates and charges upward from time to time to meet increased cost, so that at the time of the issuance of the show cause order, the contract rates were not the minimum rates actually maintained and charged for the services performed under the permit.

Section 318(a), Title 49 USC, provides in presently material part that "It shall be the duty of every contract carrier * * * to file with the Commission * * * schedules containing the minimum rates or charges of such carrier actually maintained and charged for the transportation of passengers or property in interstate or foreign commerce." And, "No such contract carrier, unless otherwise provided by ths chapter, shall engage in the transportation of passengers or property in interstate or foreign commerce unless the minimum charges for such transportation by said carrier have been published, filed, and posted in accordance with the provisions of this chapter."

Before the issuance of the show cause order, and by letter dated December 14, 1948, the Commission called attention to the variance in the scheduled and contract rates and charges, and pointed out that Section 318(a) required a contract carrier by motor vehicle to file and publish a schedule of minimum rates and charges actually maintained and charged any one shipper under its permit; that since General Motors was its only shipper, it was required to file and publish a schedule of minimum rates actually charged General Motors under its contract. And, Auto was accordingly instructed to amend its schedule of minimum rates to conform to the contract rates actually maintained and charged for the transportation performed for its shipper.

When Auto refused to comply, the show cause order was issued. Auto moved to vacate the order, contending that Section 318(a) did not authorize the Commission to require it to revise its published schedule of minimum rates to conform to its contract rates.

In its report, pursuant to which the order of suspension was entered, the Commission referred to a letter dated January 29, 1940, which its legislative committee has transmitted to the appropriate Congressional Committee, calling attention to the fact that "the words 'actually maintained and charged' are not in Section 218(2), and under that subsection, schedules may be filed containing minimum charges which are fictitious, i. e., which never have been and never will be charged. The words thus inserted will make it necessary to include in the schedules the lowest rates, fares and charges which are actually assessed, and hence the schedules will give the competing common or contract carrier adequate notice of the competition by which they are confronted." Our attention is directed to the Congressional conference report on the Transportation Act of 1940. See Rep. 2832, 76th Congress, p. 79, reflecting the views stated in the letter. Then the Commission points to the fact that Section 318(a), as thus amended, became effective on September 18, 1940. It went on to state that since its effective date, the Commission had consistently construed Section 318(a) as requiring contract carriers to file and publish schedules showing the lowest rates or charges actually maintained for the transportation in the carrier's contract; and, imposing upon the Commission the duty of requiring schedules of contract carriers to contain minimum rates and charges actually maintained and charged. And see Shipman Bros. Contract Charges Between California and Iadho, 30 M.C.C. 229; Contract Minimum Charges from and to Baltimore, Md., 32 M.C.C. 273; Petroleum Products from Wyoming Points to Missoula, Mont., 32 M.C.C. 453; In the Matter of Filing of Contracts by Contract Carriers by Motor Vehicle, 41 M.C.C. 572.

The complainant takes the position that this construction of 318(a) cuts across the established transportation policy to recognize and treat common carriers and contract car-

riers by motor vehicle as two Separate classes of transportation, as to each of which distinct and separate standards of rate regulation is applicable. See House Conference Rep. 2832, 76th Congress. Emphasis is laid upon the distinctly different duties imposed upon a common carrier and a contract carrier by the regulatory scheme. As for example, the inflexible duty of a common carrier to establish and maintain reasonable rates and charges, provide adequate service, file and publish tariffs containing such rates and charges which cannot be changed except upon thirty days notice, all of which are subject to revision and regulation by the Commission (Sec. 316-317, 49 USC), whereas a contract carrier is required only to file a schedule of reasonable minimum rates, and is free to contract for any rates or charges above such minimum reasonable rates, subject to change without notice.

The effect of the Commission's order under attack is said to destroy the distinctly different standards of rate regulations applicable to contract and common carriers by motor vehicle, contrary to and in derogation of established transportation policy. Particularly, the ultimate effect of the order is said to require the contract carrier to maintain and charge the exact rates filed and published in its schedule of minimum rates, resulting in a rigidly fixed rate which, under applicable regulations, must be filed and posted at least thirty days prior to the effective date. See Rules 49 C.F.R. 187.8(b).

It is true that the Commission's order has the effect of construing Section 318(a) to require a contract carrier to actually maintains and charges any one shipper, and since Auto has a contract under its permit with only one shipper, the order has the rather anomalous effect of requiring it to actually charge that shipper the rates filed and published in its schedule. In other words, the contract rate must be reasonable minimum scheduled rate, or vice versa. But, this does not prohibit Auto and intervenor from contracting for any rate they choose, so long as they file the schedule showing such rate to be the posted minimum reasonable rate.

Section 318(a) was deliberately amended to remove what the Commission thought was an evil inherent in the dis-

parity between the posted schedule rate and the unpublished contract rate. The order of the Commission is in obedience to the Congressional mandate. If the requirement for posting the schedule of minimum rates at least thirty days prior to the effective date works a hardship, the Commission is authorized to ameliorate it. In any event, the requirement does not destroy the validity of the Commission's order.

Belief is denied and the action is dismissed.

VAUGHT, *Dissenting:*

It is with reluctance that I disagree with my associate judges as to the majority opinion, but my conviction in my position is so firm that I cannot do otherwise.

The majority opinion contains a brief, but I think correct, statement of the facts in this case and it is not necessary to repeat them in this opinion.

There appears to be only one question for determination by this court, i.e., whether or not when a schedule is filed by the contract carrier containing the minimum rates or charges of such carrier actually maintained and charged at the time it is filed, is the carrier then required under the law to file a new schedule each time it revises by contract the rate upward?

An examination of the statute itself becomes necessary. The original statute under consideration, on October 1, 1935, used only this language:

> "It shall be the duty of every contract carrier by motor vehicle to file with the Commission, publish, and keep open for public inspection, in the form and manner prescribed by the Commission, *schedules*, or in the discretion of the Commission copies of contracts, *containing the minimum charges* of such carrier of passengers or property in interstate or foreign commerce, * * * (Emphasis supplied.)

It is conceded that under this statute, as then in force, the filing of the minimum rate charged was sufficient to satisfy the statute. It is contended by the defendants, however, that under that statute a contract carrier could file a minimum rate under the schedule of rates which would be a

"fictitious rate," or "paper rate", which would really have no relation to charges received by the carrier, and "which never have been and never will be charged." The 76th Congress, in 1940, amended the statute for the purpose of curing that situation, and the amendment (49 U. S. C. A. Sec. 318(a)), effective September 18, 1940, provided that the schedules must contain "the *minimum rates or charges* of such carrier *actually maintained and charged* for the transportation * * *." (Emphasis supplied.)

A brief reference to the history of this amendment becomes necessary. When the amendment was before Congress, Commissioner Joseph B. Eastman, Chairman of the Commission's Legislative Committee, on January 29, 1940, addressed a letter to the Chairman of the Senate Committee on Interstate Commerce, and the Chairman of the House Committee on Interstate and Foreign Commerce, recommending among other changes in the Motor Carrier Act that Section 218(a) be amended by inserting, after the clause providing that contract carriers shall file with the Commission their schedules of minimum rates, the words, "schedules of minimum rates, fares, or charges actually maintained and charged." The letter also stated that the amendment suggested would preclude "minimum charges which are fictitious, i.e., which never have been and never will be charged." And it is a reasonable conclusion that Congress enacted the amendment in order to require minimum rates which were reasonable. Certain sections of the statute, as amended in 1940, must be considered.

49 U. S. C. A. Section 318(a) reads:

> "It shall be the duty of every contract carrier by motor vehicle to establish and observe reasonable minimum rates and charges for any service rendered or to be rendered in the transportation of passengers or property or in connection therewith, and to establish and observe reasonable regulations and practices to be applied in connection with said reasonable minimum rates, fares, and charges. It shall be the duty of every contract carrier by motor vehicle to file with the Commission, publish, and keep open for public inspection,

in the form and manner prescribed by the Commission, schedules containing the minimum rates or charges of such carrier actually maintained and charged for the transportation of passengers or property in interstate or foreign commerce, and any rule, regulation, or practice affecting such rates or charges and the value of the service thereunder. No such contract carrier, unless otherwise provided by this part, shall engage in the transportation of passengers or property in interstate or foreign commerce unless the minimum charges for such transportation by said carrier have been published, filed and posted in accordance with the provisions of this part. No reduction shall be made in any such charge either directly or by means of any change in any rules, regulation, or practice affecting such charge or the value of service thereunder, except after thirty days' notice of the proposed change filed in the aforesaid form and manner; but the Commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such schedules, either in particular instances, or by general order applicable to special or peculiar circumstances or conditions, * * *"

Section 320(a) reads:

"* * * The commission may also require any motor carrier or broker to file with it a true copy of any contract, agreement, or arrangement between such carrier and any other carrier or person in relation to any traffic affected by the provisions of this chapter. The Commission shall not, however, make public any contract, agreement, or arrangement between a contract carrier by motor vehicle and a shipper, or any of the terms or conditions thereof, except as a part of the record in a formal proceeding where it considers such action consistent with the public interest: Provided, That if it appears from an examination of any such contract that it fails to conform to the published schedule of the contract carrier by motor vehicle as required

by section 318(a) of this title, the Commission may, in its discretion, make public such of the provisions of the contract as the Commission considers necessary to disclose such failure and the extent thereof."

It will be noted that the statute covers three propositions: (1) that the contract carrier is required to file with the Commission, publish and keep open for public inspection, in the form and manner prescribed by the Commission, schedules containing the minimum rates or charges of such carrier actually maintained and charged; (2) that no reduction may be made in any such charge either directly or by means of any change in any rules, regulation or practice affecting such charge or the value of service thereunder, except after thirty days' notice of the proposed change; and the 3rd proposition has reference to the actual contract between the contract carrier and the shipper, and the statute provides that the Commission may also require any motor carrier or broker to file with it a true copy of any contract, agreement or arrangement between such carrier and any other carrier or person in relation to any traffic affected. *The Commission shall not, however, make public any contract, agreement or arrangement between a contract carrier by motor vehicle and a shipper.*

It will be noted that under the first proposition the schedule containing the minimum rates or charges must be published and kept open for public inspection, and under the third proposition the contract between the carrier and the shipper reflecting the actual rate charged shall not be made public by the Commission.

In the instant case the schedule containing the minimum rates or charges was filed in 1946, and at the same time, the contract between the plaintiff and its shipper also was filed containing the actual rate charged. In this case the rate charged was the same as the minimum rate.

The significant feature of this statute is that it expressly prohibits any reduction below the minimum rate except after thirty days' notice of the proposed change, but nowhere in the Act is there any prohibition of an increase in the charges, so long as the increased charges are higher than the minimum rate.

The plaintiff contends vigorously that since it complied with the portion of the Act requiring it to file a schedule containing its minimum rate, that feature of the statute was complied with, and that since with every change it has made upward, it has filed a copy of the contract showing such changes with the Commission, and therefore that provision of the statute has been met. The defendant, however, contends that in order to meet the statutory requirement with reference to rates or charges actually maintained and charged, the minimum rate contained in the schedule must be the same as the rate actually charged under the contract.

It is admitted by the defendant in oral argument and in its brief that the minimum rate contained in the original schedule filed by the plaintiff in 1946 was a reasonable rate and that it was the rate actually charged at the time. Nowhere in the statute is there any provision that the minimum rate shall be the same as the rate actually charged. If that were the case, why use the word minimum at all? Minimum has a significant meaning, and in this Act the only reasonable construction that can be placed on the word is that it represents the lowest rate which can be charged by the contract carrier, and since the Act provides that no reduction below the minimum rate shall be charged except under certain conditions, and makes no reference whatever to an increased rate by contract, it is not clear upon what basis or theory the government contends that the minimum rate and the rate charged by contract must be the same and in the event a higher rate than the minimum rate by contract is charged, an additional schedule must be filed setting forth the minimum rate as the rate actually charged by contract.

The contentions are inconsistent. Why provide for a schedule of minimum rates if the only rate to be considered by the Commission is the rate shown in the contract? And why are contract carrier and shipper protected from the publicity of their actual contract rate if that rate must be the same as the minimum rate, which is published and kept open to the public for inspection?

This amendment was made in 1940 and this statute must not be confused with that section of the statute that has to do with common carriers. The Commission itself, in proper

orders and rulings, has placed a very different construction upon this statute from that contended for by the government in this case. The Commission, in its 63rd Annual Report to the Congress for the year 1949, after reciting that as to common carriers it has the authority "to prescribe the maximum or minimum rate, or the maximum and minimum, found to be reasonable," states that "as to contract carriers, our power is limited to the prescription of reasonable minimum rates."

In an opinion of Division 2, in Petroleum Products, Wyoming Points to Missoula, Mont., 32 M. C. C. 453, 455 (1942), the Commission, after discussing the tariffs with respect to common carriers, said:

> "A contract carrier's minimum rates, unlike common-carrier rates, do not represent a stated price for which a shipper can demand service. *The minimum rates of contract carriers, are, in fact, not rates at all in the common-carrier sense of the terms. They are simply a floor for the charges actually to be made.*" (Emphasis supplied.)

It was never the legislative intent to destroy any inherent advantages of contract carriers, and Division 5 of the Commission, in 1 M. C. C. 628, states charges of contract carriers "may be called in question only if they are found to fall below a reasonable minimum level." Division 3, in New England M. Rate Bureau, Inc. v. Lewers and McCauley, 30 M. C. C. 651 (1941), quoted the above language of Division 5 relating to that inherent advantage and went on to say:

> "The Congress intended that the minimum charges prescribed should not discourage the free movement of traffic by contract carriers."

In the oral argument, as well as in the brief, the defendant contended that different rates exist if the contract carrier serves two shippers or more than one shipper. The soundness of the argument when it was orally made was not convincing and the argument in the brief is even less so. The defendant has cited a number of district court cases, and while it will be admitted that these are not controlling over

this court, at the same time it may well be observed that they are not in point.

In summing up the situation, therefore, it is apparent that the first requirement by Congress was that the plaintiff should obtain a permit, which it did; second, that it should establish and observe reasonable minimum rates and charges, which it did; third, that it should file with the Commission, publish and keep open for public inspection a schedule of minimum rates and charges, which it did; and, fourth, that it file with the Commission its contract with its shipper in order that the Commission might know the rates which the plaintiff was, in fact, charging, which contract was not open to public inspection, and this the plaintiff did.

The only reasonable conclusion, therefore, to be reached is that when a contract carrier secures its permit, files a schedule showing its minimum rates, and then files a copy of the contract disclosing the actual rates charged the shipper, the statute has been complied with in full. There is no statutory authority for the power asserted by the Commission in directing that a new schedule be filed with each contract, if the contract represents an increased rate. That would destroy the purpose of filing a schedule showing minimum rates, and most certainly it would destroy the protection of the contract carrier and the shipper in keeping from the public the actual rate charged. Such an interpretation as contended for by the government is both arbitrary and capricious.

The injunction should be made permanent.

Endorsed: Filed in District Court Nov. 2, 1951.